

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.**

In re

**Determination of Royalty Rates and
Terms for Making and Distributing
Phonorecords (*Phonorecords III*)**

**Docket No. 16-CRB-0003-PR
(2018-2022) (Remand)**

**SERVICES' JOINT RESPONSE TO THE JUDGES' FEBRUARY 9, 2022
SUA SPONTE ORDER REGARDING ADDITIONAL BRIEFING
AND REBUTTAL REGARDING "NEW AGENCY ACTION"**

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INTRODUCTION

The Judges should retain the Initial Determination’s definition of Service Revenue for bundles, which has been in place since 2012. In *Johnson v. Copyright Royalty Board*, 969 F.3d 363 (D.C. Cir. 2020), the D.C. Circuit held that the Judges had failed to identify any legal authority in the Copyright Act that would allow them to change that definition after the Initial Determination. The court ruled out the possibility that the Judges could rely on the three specific bases in Section 803(c) or any inherent authority, but left open the possibility that the Judges might identify a different source of authority on remand. The Copyright Owners have failed to identify any such authority and none exists. The Judges must, therefore, retain the Initial Determination’s Service Revenue definition.

First, the Judges have to address the question the D.C. Circuit remanded in *Johnson*: whether the Judges have “legal authority” to “materially rework” the Initial Determination’s definition of Service Revenue for bundles. *Johnson*, 969 F.3d at 389, 392. Because this proceeding is “new agency action,” the Judges are not confined to offering a fuller explanation of their prior reasoning and may answer this question by relying on new arguments that *Johnson* does not foreclose. But the Copyright Owners are wrong to suggest that the Judges can bypass that threshold question and go straight to addressing the substance of the Service Revenue definition without first identifying their legal authority to do so consistent with *Johnson*. See Part I.

Second, the Judges cannot answer the remanded question by re-labeling the Copyright Owners’ Motion for Clarification or Correction of Typographical Errors and Certain Regulatory Terms, eCRB Doc. No. 2026 (Feb. 12, 2018) (“Motion for Clarification”), as a motion for rehearing that allows them to exercise their Section 803(c)(2)(A) rehearing authority. The D.C.

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Circuit already affirmed the Judges’ conclusion that the Copyright Owners’ motion did *not* satisfy the requirements in Section 803(c)(2)(A) or give the Judges the legal authority necessary to “materially rework” the Initial Determination’s “definition of Service Revenue.” *Id.* at 389-92. That holding is binding on remand. But, even if *Johnson* had not resolved the issue, the Copyright Owners’ motion did not trigger the Judges’ Section 803(c)(2)(A) rehearing authority because, as the Judges correctly determined years ago, the Copyright Owners’ motion unambiguously did not seek rehearing and independently did not satisfy the “exceptional” standard for rehearing. *See* Part II.

Finally, the Services briefly address the Copyright Owners’ unauthorized and irrelevant arguments concerning the substance of the Service Revenue definition, which rehash arguments that the Copyright Owners have made repeatedly and the Services have fully addressed. *See* Part III.

ARGUMENT

I. THE JUDGES MUST ANSWER THE LEGAL QUESTION THE D.C. CIRCUIT REMANDED

A. The Threshold Question is Whether the Judges Have Legal Authority to Alter the Initial Determination

Taking new agency action does not leave the Judges free to adopt a new Service Revenue definition different from the definition adopted in the Initial Determination. The Services and Copyright Owners agree that, in this remand, the Judges may “deal with the [remanded] problem afresh.” Copyright Owners’ Additional Materials Br. at 35, eCRB Doc. No. 26062 (Jan. 24, 2022); *see* Services’ Suppl. Br. at 38, eCRB Doc. No. 26054 (Jan. 24, 2022). But, contrary to the Copyright Owners’ arguments, the remanded “problem” here is *not* what the Service Revenue definition should be, but rather the threshold question whether the Judges have any

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legal authority to change the definition included in the Initial Determination. Indeed, the D.C. Circuit expressly declined to reach the Services’ arguments that the Final Determination’s Service Revenue definition was arbitrary and capricious. *See* Services’ Suppl. Br. at 39-40; *Johnson*, 969 F.3d at 389, 392. That was because the D.C. Circuit remanded a predicate legal question that the Judges must answer in the affirmative before moving on to the question whether to re-adopt the definition in the Initial Determination or the Final Determination. If that predicate question is answered in the negative — which is the only answer consistent with the statute, *Johnson*, and precedent — that ends the inquiry and requires retention of the definition in the Initial Determination.

The Copyright Owners instead argue that, on remand, the limits on the Judges’ authority to alter an Initial Determination in Section “803(c) [are] completely irrelevant.” Copyright Owners’ Additional Materials Br. at 35-36. They contend that this follows because “new agency action” permits the Judges to “deal with the problem afresh.” *Id.* at 31-33. But saying that the problem may be considered “afresh” does not identify the “problem.” The Copyright Owners ignore that the “problem” the Judges face in this remand — i.e., the problem subject to new agency action — is the *legal* error that *Johnson* identified and remanded.

Accepting the Copyright Owners’ position would eviscerate any effort by Congress to limit the scope of an agency’s rehearing authority, as the D.C. Circuit found Congress did in the Copyright Act. *See Johnson*, 969 F.3d at 390 (“Section 803 identifies three ways in which the Board can revise Initial Determinations.”).¹ In the Copyright Owners’ view, an agency with

¹ In contrast, other agencies may reconsider their orders *sua sponte* or in the absence of “exceptional” circumstances. *See, e.g.*, 47 U.S.C. § 405(a) (FCC may grant reconsideration “if sufficient reason therefor be made to appear”); 16 U.S.C. § 8251(a) (FERC may, “upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order”); *see also, e.g., Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099,

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limited rehearing authority could willfully disregard those limits to revise a decision. If no party appealed, the unlawful revision would stand. But if a party appealed, the reviewing court would find the revision unlawful and remand. And then, on remand, the agency could proceed to re-adopt the revised decision as “new agency action,” with the statutory limits on its rehearing authority rendered, in the Copyright Owners’ words, “completely irrelevant.” No case supports the Copyright Owners’ position that statutory limits on rehearing authority can so easily be rendered meaningless.

Instead, every case the Copyright Owners cite confirms that agencies must respond to the remanded issue. *See* Copyright Owners’ Additional Materials Br. at 33-38. In *Fisher v. Pension Benefit Guaranty Corp.*, 994 F.3d 664 (D.C. Cir. 2021), the district court had vacated a benefits denial that was “‘in at least some tension with’ ERISA’s text.” *Id.* at 669 (citing *Fisher v. Pension Benefit Guaranty Corp.*, 151 F. Supp.3d 157, 167 (D.D.C. 2016)). The remanded question was thus whether ERISA provided a basis to lawfully deny the plaintiff’s request. The D.C. Circuit affirmed the “new agency action” taken on remand because the agency explained that a regulation it had not previously invoked precluded the plaintiff’s benefits request. *Id.* at 668. In identifying that alternative legal authority, the agency answered the remanded question through new agency action. *Id.* at 670.

In *Friends of the River v. National Marine Fisheries Service*, 786 F. App’x 666 (9th Cir. 2019), the Ninth Circuit found that the Fisheries Service had failed to “provide a reasoned explanation for why it changed positions” on whether it had to consider the operation of dams and hydroelectric facilities on endangered fish. *Id.* at 669. The district court then agreed with

1107-09 (D.C. Cir. 1989) (affirming the breadth of FERC’s authority to reconsider its decisions *sua sponte*).

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the Fisheries Service that, in responding to the remand, the agency was not limited to providing a fuller explanation of the change of position in its initial endangerment finding and could, instead, engage in new agency action and adopt a new endangerment finding. *See Friends of the River v. Nat'l Marine Fisheries Serv.*, 2020 WL 6391314, at *2 (E.D. Cal. Nov. 2, 2020). But the Ninth Circuit never questioned the Fisheries Service's legal authority to issue an endangerment finding. The district court's decision construing the Ninth Circuit's remand, therefore, does not assist the Copyright Owners' argument here.

In *Lewis v. United States Army Corps of Engineers*, 2020 WL 4798496 (E.D. La. Aug. 18, 2020), the district court set aside the Corps' determination that water on Lewis's property was subject to the federal Clean Water Act because the Corps had not given an adequate explanation for that conclusion. *See id.* at *5-9. In response to that ruling, the Corps decided instead that the property was subject to the Clean Water Act because it was mostly wetlands. *See Lewis v. United States Army Corps of Eng'rs*, 2021 WL 1401756, at *1 (E.D. La. Apr. 14, 2021). The district court explained that the Corps was "entitled" — that is, it had legal authority — to make that alternative finding and, therefore, complied with the court's mandate. *Id.* at *2. Because the district court had never called into question the agency's legal authority, the Corps' decision to rely on an alternative basis for asserting Clean Water Act jurisdiction was responsive to the remand. *Lewis* also confirms that a court or agency "on remand must 'implement both the letter and the spirit of the [appellate court's] mandate,' and may not disregard the explicit directives of that court." *Id.*

The other cases the Copyright Owners cite are even further afield. In *Bean Dredging, LLC v. United States*, 773 F. Supp. 2d 63 (D.D.C. 2011), the agency on remand offered a fuller explanation of its prior action — it did not take new agency action. *See id.* at 78. And *Black*

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Warrior Riverkeeper, Inc. v. EPA, 2021 WL 927260 (N.D. Ala. Mar. 11, 2021), did not involve a remand at all. While the words “new agency action” appear in that decision, the district court was explaining why the EPA’s 2020 action had “superseded” its 2018 action, so that the newer action was the only one the plaintiff could challenge. *Id.* at *5-6.

B. The Copyright Owners Effectively Have Conceded That the Judges Lack Authority Under Section 803(c) To Change the Initial Determination

Throughout this remand, the Copyright Owners have made no serious effort to answer the question the D.C. Circuit remanded: what is the source of legal authority for the Judges to substantively alter the Initial Determination’s Service Revenue definition for bundles? In their initial submission on remand, the Copyright Owners relegated their discussion of Section 803(c) to a footnote, but only in an effort to explain how the Judges could offer a fuller explanation that would be “[i]n lieu of taking ‘new agency action.’” Copyright Owners’ Initial Remand Submission at 71 n.33, eCRB Doc. No. 23866 (Apr. 1, 2021). But the “fuller explanation” path on remand allows an agency only to “elaborate” on its “initial explanation” for its action — it “may not provide new ones.” *DHS v. Regents of the Univ. of Ca.*, 140 S. Ct. 1981, 1908 (2020). Yet new reasons are all that the Copyright Owners suggested in that footnote. *See Services Remand Reply Br.* at 55, eCRB Doc. No. 25427 (July 2, 2021). In their reply brief, the Copyright Owners asserted that the Judges “gave *no* reasons” initially as to the source of their rehearing authority and claimed that the “fuller explanation” path therefore allowed them to come up with new reasons on remand. Copyright Owners’ Remand Reply Br. at 70-71, eCRB Doc. No. 25423 (July 2, 2021). That is wrong. As the Supreme Court has held, where a purported “basis for” a decision on remand is “nowhere to be found” in the initial decision, providing one “can be viewed only as impermissible *post hoc* rationalization[.]” rather than a “fuller explanation.” *Regents*, 140 S. Ct. at 1908-09.

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In their reply brief, the Copyright Owners also asserted — as their lead argument on this question — that when taking “new agency action” on remand, the Judges could act “without regard to Section 803(c)(2) or 803(c)(4)” altogether and that the Judges “need not comply with” those sections on remand. Copyright Owners’ Remand Reply Br. at 65 & 66 n.50. The Copyright Owners reprise that argument in their supplemental filing when they assert that Section “803(c) is completely irrelevant” when the Judges take new agency action on remand. Copyright Owners’ Additional Materials Br. at 35-36. As shown above, that too is wrong.

II. THE JUDGES CANNOT INVOKE THEIR REHEARING AUTHORITY BY CONSTRUING THE COPYRIGHT OWNERS’ “MOTION FOR CLARIFICATION” AS A REHEARING MOTION

A. *Johnson* Upheld the Judges’ Conclusion that the Copyright Owners Did Not Seek Rehearing or Satisfy the Rehearing Standard

In *Johnson*, the D.C. Circuit expressly answered the question whether Judges’ “material revision of the ‘Service Revenue’ definition for bundled offerings . . . fall[s] within the Board’s rehearing authority under Section 803(c)(2)(A)” — it “does not.” 969 F.3d at 390. The D.C. Circuit explained that the Copyright Owners did not satisfy either prong of Section 803(c)(2)(A), which authorizes rehearing only “upon motion of a participant” and “in exceptional cases.” First, “the Copyright Owners’ motion did not request a literal rehearing.” *Id.* (cleaned up). The court agreed with the Judges’ decision not to treat the Copyright Owners’ motion as one for rehearing. *See id.* (citing Final Determination at 1918 n.2). And the court agreed with the Judges’ further finding that the “Copyright Owners’ motion did not meet the exceptional standard for granting rehearing motions.” *Id.* (citing Rehearing Order at 2, eCRB Doc.No. 3602 (Jan. 4, 2019)) (cleaned up). Indeed, the D.C. Circuit cited approvingly the Judges’ conclusion

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that the “Copyright Owners ‘failed to make even a *prima facie* case for rehearing.’” *Id.* (quoting Rehearing Order at 2).²

Having held that Section 803(c)(2)(A) and Section 803’s other two mechanisms for altering an initial determination did not “fit” the circumstances, the D.C. Circuit vacated the Final Determination’s altered Service Revenue definition. *Id.* at 390, 392. The court remanded for the Judges to address whether they had “any legal authority” to “materially rework” the Initial Determination’s Service Revenue definition. *Id.* at 389-92. And because the court vacated the Final Determination’s Service Revenue definition for this reason, it had “no occasion to address the Streaming Services’ separate argument that the definition [adopted in the Final Determination] was arbitrary, capricious, or unsupported by substantial evidence.” *Id.* at 392.

As the Judges have recognized, where the “D.C. Circuit has ruled on [an] issue,” a party “has no further recourse in this proceeding.” Order on GEO Motion Regarding Indexing Subpart B Rates at 1, eCRB Doc. No. 26046 (Jan. 24, 2022). And the Judges have further explained that, even where the D.C. Circuit in *Johnson* merely “acknowledged” a finding in the Final Determination that was not appealed or remanded — there, that the major record labels have complementary oligopoly power — that finding also cannot be contested on remand. Order on Services’ Motion to Strike at 13, eCRB Doc. No. 25704 (Oct. 1, 2021). It follows that the Judges are bound by the D.C. Circuit’s determinations that the Copyright Owner’s post-Initial

² On appeal, government counsel defending the Final Determination made “equivocal” claims that the Judges might have invoked their Section 803(c)(2)(A) rehearing authority notwithstanding the Judges’ clear statements that they had not considered the Copyright Owners’ Motion for Clarification as a motion for rehearing. *Johnson*, 969 F.3d at 390-92. While the D.C. Circuit rejected this argument for the threshold reason that it was an impermissible *post hoc* rationalization, *id.* at 390-91, it was also inconsistent with the court’s conclusion that Section 803(c)(2)(A) did not “fit” the circumstances, *id.* at 390.

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Determination motion was not a motion for rehearing and did not satisfy the exceptional cases standard. Because the Judges' Section 803(c)(2)(A) rehearing authority is among the grounds that *Johnson* addressed and determined do not “fit” the circumstances, the Judges cannot rely on that authority on remand. 969 F.3d at 390.

B. Even if the Judges Could Revisit the Question, They Should Adhere to Their Finding that the Copyright Owners' Motion Did Not Satisfy Section 803(c)(2)(A)

1. The Copyright Owners' Motion Was Not a Motion for Rehearing

The Judges correctly concluded years ago that the Copyright Owners' “Motion for Clarification” was not a motion for rehearing. That motion cannot be retroactively cast as a motion for rehearing now.

First, the Copyright Owners — who are sophisticated, repeat players in this forum and well-acquainted with its rules — never presented their motion as one for rehearing. To the contrary, the Copyright Owners expressly “disclaimed any intent to seek rehearing.” *Johnson*, 969 F.3d at 374. They labeled their motion as a “Motion for Clarification or Correction of Typographical Errors and Certain Regulatory Terms.” In the opening sentences of their motion, the Copyright Owners underscored that they did “not request rehearing” and were asking the Judges to correct ministerial errors, not change the substance of their ruling:

The [Copyright Owners] **do not request rehearing**, but submit this motion pursuant to the general motion procedures of 37 CFR §§ 350.3 and 350.4 to put before the Judges certain questions concerning the regulatory terms (“Regulatory Terms”) attached to the Initial Determination (the “Determination”).

The Copyright Owners submit for the Judges' consideration correcting what appear to be **typographical and similar errors** (including missing or incomplete definitions) in certain of the regulatory terms and modifying or clarifying certain of the Regulatory Terms to conform them to what appears to be the intent of the Determination.

Motion for Clarification at 1 (emphases added).

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Consistent with the Copyright Owners’ express request, the Judges did not treat the motion as one for rehearing. *See* Rehearing Order at 1 (Copyright Owners “styled their motion as one for technical corrections” and “do not request rehearing.”); Final Determination at 1918 n.2 (“The Judges did not treat the motions as motions for rehearing under 17 U.S.C. § 803(c)(2), as neither requested a literal rehearing of evidence or legal argument.”). And because the Copyright Owners did not challenge that decision on appeal, it is too late for them to do so now. *See, e.g., Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995); *United States v. Thomas*, 572 F.3d 945, 949 (D.C. Cir. 2009).³

Second, the Copyright Owners’ Motion did not make any attempt to satisfy the “exceptional cases” standard set out in 17 U.S.C. § 803(c)(2)(A) or even mention that standard.⁴ The Copyright Owners did not purport to identify any new evidence, new legal authority, or even a substantive error in the Judges’ reasoning in the Initial Determination. Instead, the motion asserted that the Judges’ inclusion of the longstanding definition of Service Revenue in the Initial Determination was supposedly “inadvertent.” Motion for Clarification at 12. The Copyright Owners did not identify any specific evidence in the *Phonorecords III* record or aspect of the Initial Determination that suggested the inclusion of this definition was a simple mistake. *Id.*

³ Indeed, even in their most recent filing, the Copyright Owners continued to deny that they are asking the Judges to invoke their Section 803(c)(2)(A) rehearing authority. *See* Copyright Owners’ Additional Materials Br. at 35 (“This is not a rehearing . . . and thus need not satisfy 803(c)’s ‘exceptional cases’ standard.”).

⁴ The Judges have explained that the “exceptional” cases standard requires a showing that “(1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct a clear error or prevent manifest injustice.” Order Denying Mot. for Reh’g at 1, *SDARS I*, Docket No. 2006-1 CRB DSTRA (Jan. 8, 2008) (“*SDARS I* Rehearing Order”); *see* Order Denying Mots. for Reh’g at 1-2, *Web II*, Docket No. 2005-1 CRB DTRA (Apr. 16, 2007) (“*Web II* Rehearing Order”) (same).

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Moreover, the motion did not comply with the procedural requirements for a motion for rehearing. The motion instead cited the “general motion procedures of 37 CFR §§ 350.3 and 350.4.” And rather than abiding by the 10-page limit on motions for rehearing imposed by 37 C.F.R. § 353.2, it extended for 13 pages, and did not begin to discuss the definition of Service Revenue until page 11. Federal courts often stop reading briefs beyond the applicable page limits.⁵ The Judges would have been equally justified in doing so had they treated the Copyright Owners’ Motion for Clarification as an over-length motion for rehearing.

The Judges cannot invoke their Section 803(c)(2)(A) authority by rewriting a participant’s motion to say it is seeking rehearing when that participant specifically and unambiguously “disclaimed any intent to seek rehearing.” *Johnson*, 969 F.3d at 374. The Copyright Owners made an intentional, strategic choice to not seek rehearing. They must bear the consequences of that choice. If it were otherwise, Section 803(c)(2)(A)’s limitation that the Judges rehearing authority requires a “motion of a participant” would be a “nullity,” *id.* at 389-92, allowing the Judges to make substantive changes to initial determinations *sua sponte*. But *Johnson* held the opposite, rejecting the argument that the Judges have any such “inherent authority.” *Id.* The Judges must follow the limitations Congress set out in Section 803(c)(2)(A), which allow the Judges to exercise their rehearing authority only “upon motion of a participant.” *Id.* Deeming the Copyright Owners’ Motion for Clarification to be a motion for rehearing —

⁵ See, e.g., *Kramer v. Lockwood Pension Servs., Inc.*, 653 F. Supp. 2d 354, 402 (S.D.N.Y. 2009) (“The Court will not read beyond the specified length.”); *Sawyer v. Bill Me Later, Inc.*, 2010 WL 5289537, at *6 n.6 (C.D. Cal. Oct. 4, 2010) (“[T]he Court admonishes Plaintiff for violating the Standing Order and warns that the Court will stop reading any future filings that exceed the page limit proscribed in the Standing Order.”); *Kaseburg v. Port of Seattle*, 2015 WL 6449305, at *3 n.1 (W.D. Wash. Oct. 23, 2015) (“[T]he Court warns Plaintiffs that if they file an overlong motion again, the Court will not read beyond the page limit and may undertake further action.”).

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when it unambiguously said it was *not* a motion for rehearing — would write the phrase “upon motion of a participant” out of Section 803(c)(2)(A) and exceed the authority Congress granted.

Id.

2. *The Copyright Owners’ Motion Does Not Satisfy The “Exceptional” Rehearing Standard*

The Judges also correctly concluded that, even if the Copyright Owners’ Motion for Clarification had requested rehearing, that motion “would not and does not meet that exceptional standard for granting rehearing motion” and “failed to make even a *prima facie* case for rehearing.” Rehearing Order at 2; *see* Final Determination at 1918 n.2.

The Judges apply a “strict standard” to *bona fide* rehearing motions to prevent parties from using “the rehearing process to seek a ‘second bite at the apple’” by advancing “theories and arguments that could have been advanced earlier” during the proceeding. Order Denying in Part SoundExchange’s Mot. for Reh’g and Granting in Part Requested Revisions to Certain Regulatory Provisions at 2, *Web IV*, Docket No. 14-CRB-0001-WR (2016-2020) (Feb. 10, 2016) (“*Web IV* Rehearing Order”). “A motion for rehearing is procedurally too late for an assertion of a substantive argument.” *Id.* at 4, 6.⁶

Under this standard, the Judges have repeatedly denied motions that explicitly seek rehearing on the ground that they attempt to “introduce new tactics, new theories, or new evidence” that could have been presented during the hearing. *Web IV* Rehearing Order at 6. For example, in *Web II*, the Judges denied all rehearing motions that the parties filed. While some of those motions purported to identify new evidence, the Judges found that the evidence “could

⁶ *See also, e.g., Web II* Rehearing Order at 2 (“Motions for rehearing do not support a change of tactics for a party to present a new theory or evidence after the trial is concluded.”); *SDARS I* Rehearing Order at 3 (same).

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have been discovered during the proceeding, with reasonable diligence” and, therefore, did “not present the type of exceptional case that would warrant a rehearing.” *Web II* Rehearing Order at 2. Similarly, in *Web IV*, the Judges declined SoundExchange’s invitation to reconsider the initial determination’s approach to “blending” the rates appropriate for major and independent record labels. The Judges rejected many of SoundExchange’s arguments for rehearing because SoundExchange was attempting to use the rehearing process to get a “second bite at the apple” by presenting arguments that it could have raised during the proceeding but did not. *Web IV* Rehearing Order at 9; *see, e.g., id.* at 9 n.11 (“SoundExchange never made this argument at the hearing. That issue cannot be raised for the first time on rehearing.”).⁷

In the *SDARS* proceedings, the Judges have repeatedly applied this rule to deny motions for rehearing seeking changes to the definition of “Revenue” used in the regulations governing that service. For example, in *SDARS I*, SoundExchange challenged the initial determination’s definition of “Gross Revenue” as too narrow. *SDARS I* Rehearing Order at 2. SoundExchange had proposed a broader definition of “Gross Revenue” during the proceeding, but it failed to come forward with credible evidence supporting its proposed definition or establishing that the initial determination’s definition was too narrow. *See, e.g., id.* at 2 (SoundExchange did “not provide a shred of evidence concerning the nature or magnitude of leakage” under its proposed definition of “Gross Revenue”).⁸ While SoundExchange attempted to raise new arguments about

⁷ *See also, e.g., Web IV* Rehearing Order at 4 (“SoundExchange did not argue this point during the hearing.”); *id.* at 10 (“At no point in this proceeding did SoundExchange advance the argument that it now asserts.”).

⁸ *See also, e.g., SDARS I* Rehearing Order at 2 (SoundExchange “failed to introduce evidence to identify which categories of . . . nonsubscription revenue . . . are encompassed in whole or in part by its definition”); *id.* at 3 (SoundExchange “failed to introduce any evidence to identify what proportion of . . . ‘other’ nonsubscription revenue line items . . . are encompassed by that definition”).

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the evidence the Judges relied on in the initial determination — and speculated that the initial determination’s definition of “Gross Revenues” might result in “future ‘gaming the system’” — the Judges rejected those arguments. *Id.* at 4. The Judges found them impermissible attempts to change tactics or advance new theories or evidence on rehearing. *See id.* at 3, 5.⁹ In *SDARS II*, SoundExchange again sought changes to the initial determination’s definition of “Gross Revenue” — that time, based on unsupported “speculat[ion]” about products Sirius XM might offer in the future. Order Denying Mots. for Reh’g at 6, *SDARS II*, Docket No. 2011-1 CRB PSS/Satellite II (Jan. 13, 2013). The Judges again denied SoundExchange’s motion, explaining that its speculation about “a potential future application of the regulations” did not meet the standard for rehearing. *Id.*

The same reasoning applies to the Copyright Owner’s motion, which did not even purport to identify an intervening change in law, new evidence, or a clear error in the Initial Determination’s reasoning. In fact, the Copyright Owners’ motion did not point to any evidence in the *Phonorecords III* record at all. And, as the Services have repeatedly shown, the only evidence in the *Phonorecords III* record concerning bundles supports the longstanding definition of Service Revenue which has been effective in encouraging the Services to offer bundles that benefit Copyright Owners by growing the market for music streaming services. *See Services’*

⁹ The Judges also rejected certain of SoundExchange’s arguments on the independent ground that SoundExchange waived those arguments by failing to present them in its proposed findings of fact and conclusions of law. *SDARS I* Rehearing Order at 3 (citing 37 C.F.R. § 351.14 (“A party waives any objection to a provision in the determination unless the provision conflicts with a proposed finding of fact or conclusion of law filed by the party.”)); *see also, e.g., Web II* Rehearing Order at 2-3 (“We deem these claims to have been waived because the parties failed to assert such claims during the proceeding in their proposed findings of fact and conclusions of law.”). Had the Copyright Owners actually sought rehearing, the Judges could — and should — have rejected the request on this ground as well.

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Opposition to Copyright Owners Motion for Clarification, at 3-5, eCRB Doc. No. 2171 (Mar. 5, 2018); Services’ Remand Opening Br. at 68-76, eCRB Doc. No. 23849 (Apr. 1, 2021) (discussing record evidence supporting existing Service Revenue definition).

This is also not the extraordinary case where a party has identified an error that, if left uncorrected, would result in “manifest injustice.” As D.C. federal courts have explained, “it is clear that ‘manifest injustice’ is an exceptionally narrow concept.” *Slate v. Am. Broad. Companies*, 12 F. Supp. 3d 30, 35-36 (D.D.C. 2013). There is “no ‘manifest injustice’ where, as here, [the moving party] could have easily avoided the outcome, but either failed to exercise due diligence, or elected not to act until after the entry of judgment.” *Mohammadi v. Islamic Republic of Iran*, 782 F.3d 9, 18 (D.C. Cir. 2015) (cleaned up); *cf. Leidos, Inc. v. Hellenic Republic*, 881 F.3d 213, 220 (D.C. Cir. 2018) (district court erred in granting a motion for reconsideration requesting judgment be converted from euros to dollars where movant had previously requested euros).¹⁰

“Manifest injustice” can arise from “rulings that upset settled expectations — expectations on which a party might reasonably place reliance.” *Leidos*, 881 F.3d at 217 (quoting *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007)); *see, e.g., Slate*, 12 F. Supp. 3d at 35 (same). But because the Initial Determination adopted a definition of Service Revenue in use since 2012 — and because the Copyright Owners never put forward an alternative definition during the proceeding — that decision did not “upset” settled expectations. Instead, it *conformed* to them. Indeed, abandoning the longstanding definition and retroactively

¹⁰ *See also, e.g., Morrissey v. Mayorkas*, 17 F.4th 1150, 1160-61 (D.C. Cir. 2021) (affirming denial of motion for reconsideration that “raised new arguments, all of which were previously available”); *Slate*, 12 F. Supp. 3d at 35-36 (denying motion for reconsideration that “boil[ed] down to another ‘bite at the apple’”).

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applying a “diametrically-opposed approach,” as Copyright Owners advocate, would be substantially more likely to upset settled expectations and cause “manifest injustice” than retaining the existing definition. *Johnson*, 969 F.3d at 391.¹¹

Far from showing any injustice, the Copyright Owners’ challenge to the existing Service Revenue definition represented a straightforward attempt to newly litigate an issue the Copyright Owners declined to contest during the initial proceeding. The Copyright Owners raised their challenge to the existing Service Revenue definition only after the Judges rejected their per-play/per-user approach. *See* Initial Determination at 92 (“Copyright Owners’ proposed per-unit rate structure obviates the need for a Service Revenue definition; consequently it does not include one.”); Rehearing Order at 17 (explaining that Copyright Owners “did not present evidence to support a different measure of bundled revenue because their rate proposal was not revenue-based”). The Rehearing Order also reflected that absence of evidence. The Majority adopted a new Service Revenue definition “[b]y default” because it believed that “[n]either party presented evidence adequate” to support its proposed rule. Rehearing Order at 17-18. That

¹¹ In *SDARS III*, the Judges relied on a 2003 D.C. federal district court decision, *Fresh Kist Produce, LLC v. Choi Corporation*, 251 F.Supp.2d 138 (D.D.C. 2003), to interpret the “manifest injustice” prong of the standard for reconsideration under Fed. R. Civ. P. 59(e). Order Granting in Part and Denying in Part Sirius XM’s Mot. for Reh’g at 7, *SDARS III*, Docket No. 16-CRB-0001 SR/PSSR (2018-2022) (Apr. 17, 2018). In *Fresh Kist*, the party seeking rehearing had timely and expressly sought pre-judgment interest, but did not adequately detail the basis for that request in its summary judgment motion. 251 F. Supp. 2d at 141. Under those circumstances, the court was willing to consider the plaintiff’s arguments in favor of an award of pre-judgment interest in the context of a post-judgment motion. *See id.*; *see Ace Seguros, S.A. v. Werner Enterprises*, 2007 WL 9701695, at *1 n.1 (S.D. Fla. Oct. 11, 2007) (explaining that *Fresh Kist* addresses the situation where a “Plaintiff did expressly seek prejudgment interest and [was] not raising it for the first time” in a post-judgment motion). In contrast, as the Judges previously recognized, it was not until *after* the Initial Determination that the Copyright Owners first proposed an alternative definition of Service Revenue to address bundles. *Fresh Kist*, therefore, is inapposite.

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reasoning both confirms the absence of any “exceptional” circumstances meriting rehearing and was, in itself, a clear legal error. The D.C. Circuit has twice reversed as arbitrary and capricious similar decisions made in an evidentiary vacuum. *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 767 (D.C. Cir. 2009); *Settling Devotional Claimants v. Copyright Royalty Bd.*, 797 F.3d 1106, 1121 (D.C. Cir. 2015).¹²

The absence of any new facts or any showing of manifest injustice remains as clear now as it was in 2018. Even in this remand proceeding — which the Copyright Owners erroneously assert permits the Judges to create a Service Revenue definition *de novo* — the Copyright Owners *still* have repeatedly declined opportunities to introduce new record evidence on this issue.¹³ Given this procedural history and the unchanged state of the record since the initial hearing, any claim that the Copyright Owners have somehow now satisfied the “exceptional cases” standard would be clear error.¹⁴ Just as “[i]t is hard to see how the need to ground the original definition in the record [could be] an unforeseen circumstance” under § 803(c)(4), *Johnson*, 969 F.3d at 391, it is impossible to imagine that the Copyright Owners’ failure even to propose their preferred definition before the Initial Determination — let alone to introduce

¹² The Services appealed that issue in *Johnson*, but the D.C. Circuit did not need to reach it in light of the absence of any identified legal authority to change the Initial Determination’s Service Revenue definition for bundles. *See Johnson*, 969 F.3d at 392.

¹³ *See* Order Regarding Proceedings on Remand at 1-2, eCRB Docket No. 23390 (Dec. 15, 2020) (noting and “accept[ing]” that “agree[ment]” not to reopen record regarding the Service Revenue definition); Copyright Owners’ Mot. for Reconsideration or Clarification at 15, eCRB Docket No. 25978 (Dec. 17, 2021) (arguing that “adduc[ing] additional evidence on the Service Revenue issue . . . is not necessary and would unnecessarily delay resolution of the Remand”).

¹⁴ As the Services have already established, the Copyright Owners’ proposed definition of Service Revenue is not supported by any record evidence. *See* Part III.

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record evidence supporting that definition — could now make this the “exceptional case” that merits rehearing under § 803(c)(2)(A).

The Judges’ prior determination that the Copyright Owners’ motion did “not meet [the] exceptional standard for granting rehearing motions,” Rehearing Order at 2, was correct and there is no basis to depart from that conclusion on an identical record on this issue.

III. THE COPYRIGHT OWNERS’ ARGUMENT REGARDING THE SUBSTANTIVE MERITS OF THE SERVICE REVENUE DEFINITION WAS NOT AUTHORIZED BY THE JUDGES AND IS IN ANY CASE INCORRECT

The Judges did not authorize additional briefing on the underlying merits of the Service Revenue definition. *See* Order Directing the Parties to Provide Additional Materials at 4, eCRB Doc. No. 25965 (Dec. 9, 2021) (seeking only “additional briefing setting forth the parties’ views on whether this proceeding constitutes the type of new agency action addressed by the D.C. Circuit”). The Judges should therefore disregard the Copyright Owners’ unauthorized further argument on the merits on that definition in its entirety. *See* Copyright Owners’ Additional Materials Br. at 39-46.

In any event, the Copyright Owners largely repeat arguments that the Services have already addressed, and the Services will not repeat those arguments here. *See* Services’ Remand Reply Br. at 57-62; Services’ Remand Opening Br. at 68-76. The Copyright Owners raise one new argument in their Additional Materials Br. (at 45-46):

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Copyright Owners also make a number of erroneous statements about the Judges’ prior rulings in the *SDARS* proceedings. The Gross Revenue definition there does “permit an SDARS to engage in . . . allocation among offerings in a bundle” — the Copyright Owners are wrong to assert otherwise. Copyright Owners’ Additional Materials Br. at 42-43. The SDARS revenue definition includes several categorical exclusions, including revenues recognized for the provision of programming “for which the performance of sound recordings . . . is exempt from any license requirement or is separately licensed, including by a statutory license and, for the avoidance of doubt, webcasting, audio services bundled with television programming, interactive services, and transmissions to business establishments.” 37 C.F.R. § 382.22(b)(7)(iv). If Sirius XM bundles satellite radio service with, for example, internet webcasting, the definition clearly calls for an exclusion of revenue allocable to the webcasting portion of the bundle.

The Copyright Owners are likewise wrong to argue that Sirius XM “conceded” in *SDARS I* that it is appropriate to treat as Gross Revenue the full standalone price of its satellite radio service when that service is bundled with other non-music products — or that the Judges’ Interpretive Ruling addressing Sirius XM’s Premier Package stands for any such thing. *See* Copyright Owners’ Additional Materials Br. at 43. The Judges *rejected* Sirius XM’s exclusion of revenue for certain premium non-music channels not based on any view of the appropriate allocation of value to the music service portion of the bundle, but because those channels were

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not “separately charged” — a specific requirement unique to the SDARS revenue definition. Ruling on Regulatory Interpretation, *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 82 Fed. Reg. 56725, 56734 (Nov. 30, 2017). Indeed, the very same decision approved of Sirius XM’s exclusion of revenue for the performance of pre-1972 recordings, which had the effect of lowering its reported revenues for its satellite radio service to *below* the standalone \$12.95 price. *See id.* at 56735 n.41 (explaining that Sirius XM had attempted to fashion a “reasonable alternative” for estimating the exclusion based on the share of pre-1972 performances). The Copyright Owners’ attempt to provide evidence of the standalone prices of music services is thus not only procedurally improper, but irrelevant.

CONCLUSION

For the reasons stated above, the Judges should retain the Initial Determination’s definition of Service Revenue.

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Respectfully submitted,

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Proof of Delivery

I hereby certify that on Thursday, February 24, 2022, I provided a true and correct copy of the Services' Joint Response to the Judges' February 9, 2022 Sua Sponte Order Regarding Additional Briefing and Rebuttal Regarding "New Agency Action" (PUBLIC) to the following:

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